U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17929783

Date: DEC. 22, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner submits a brief asserting that she is eligible for a national interest waiver.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to the individual's education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

The Petitioner alleges on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, to [her] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests.[4] Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions.[5] While the Petitioner asserts on appeal that she has provided evidence sufficient to demonstrate her eligibility for a national interest waiver, she does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated eligibility under the first prong of the *Dhanasar* analytical framework. The Petitioner initially provided a statement about her proposed endeavor indicating:

> I intend to continue my career in the United States working in the area of nutrition, specializing in Clinical Nutrition, Orthomolecular Nutrition, Biofunctional Nutrition, and Functional Phytotherapy.
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> . . . .
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> [I will] advance my proposed endeavor through creating nutritious meals for individuals, improving recovery times for patients in hospitals and clinics, and bringing new nutritional strategies and tactics [] into the United States. My goal in the United States is to continue my career in this field, by working with U.S. citizens in order to improve their well-being and their standard of living. I will accomplish this by seeking out employment with hospitals, companies, and institutions.
>
> . . . .

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] *See Matter of Chawathe*, 25 I&N Dec. at 375 (AAO 2010); *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).
[5] *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual.

The Director issued a request for evidence (RFE), asking for more information and evidence to establish the national importance of the proposed endeavor. In response, the Petitioner submits a revised "Professional Plan & Statement." Parts of this statement repeat the earlier version, but she adds that she has founded a company, [N-], and will alternatively focus her endeavor, as follows:

> My proposed endeavor in the United States is to become a Registered Dietician Nutritionist and open my nutrition clinic focused on behavioral changes of each patient/client and their influence in the entire community, hiring other specific professionals such as psychologists, speech therapists, occupational therapists, and health and wellness coaches to achieve success and contribute to a healthier and more prosperous nation. I also plan to pursue a Doctorate Degree in Health Science at [K-] University in Florida. This university has courses in nutrition validated by the Florida Board of Nutrition and Dietetics.

The record shows that the Petitioner did not form her new company until August 2020, eleven months after she filed the petition. Her initial description of the proposed endeavor did not include plans to form such a company, nor did it include her plan to earn a doctoral degree in health science. We conclude the RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see* also *Dhanasar*, 26 I&N Dec. at 889-90. The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). Here, the Petitioner's establishment of a new company and her plan to pursue education credentials that would enable her to perform services as a registered dietician/nutritionist in her clinic presented after the filing date cannot retroactively establish eligibility. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

On appeal, the Petitioner relies upon the evidence she previously submitted and asserts that her "endeavor is to become a licensed dietician and nutritionist in the United States and to open her nutrition clinic." Again, we note that the Petitioner has changed her focus from "creating nutritious meals for individuals, improving recovery times for patients in hospitals and clinics" through her employment with U.S. "hospitals, companies, and institutions," to pursuing a doctoral degree and providing patient services that largely appear to be beyond the typical services provided by nutritionists to clients in her newly established nutrition clinic.[6] For instance, the Petitioner indicates in her business plan that N- "will offer physical training programs and nutritional counseling programs in person and on-line – Mental Health therapy, Speech-language pathologists, and some other ways of improving the patient's quality of life." Towards that end, she plans to become "a Certified Wellness Coach," and "will be able to work in the field of behavioral change, being able to act in several situations such as, influencing patients, [] who are in doubt if they should start a specific food plan for weight loss or if they will succeed in practicing a physical activity program as determined by their doctor."

[6] The Department of Labor's (DOL) Occupational Information Network (O*NET) Summary Report for the occupational category "Dieticians and Nutritionists" indicates that typical duties performed within the occupation include "[planning] and conduct[ing] food service or nutritional programs to assist in the promotion of health and control of disease. May supervise activities of a department providing quantity food services, counsel individuals, or conduct nutritional research," which may be viewed at https://www.onetonline.org/link/summary/29-1031.00. (Last visited Dec. 22, 2021).

It appears the Petitioner sought to address the Director's concerns regarding what organization would utilize her nutritionist skills and how her services would rise to the level of national importance, but in so doing, she has significantly changed her proposed endeavor. Notably, the Petitioner does not adequately explain how she would allocate her time between seeking employment with U.S. companies as a nutritionist (which was her initially stated endeavor), if any, and her proposed activities newly presented in the RFE response, such as establishing and running her own clinic, obtaining her credentials to become a registered dietician and a certified wellness coach, and pursuing a doctoral degree. Accordingly, we conclude that both the focus of her endeavor as well as her field of endeavor have materially changed. If significant material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. 8 C.F.R. § 103.2(b)(1).

In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis. *See Dhanasar*, 26 I&N Dec. at 889-90. Because the Petitioner has not provided consistent information regarding her proposed endeavor, we cannot conclude that she meets either the first or second prong, or that she has established eligibility for a national interest waiver. Further analysis of her eligibility under the third prong outlined in *Dhanasar*, therefore, would serve no meaningful purpose.[7]

III. CONCLUSION

As the Petitioner has not met the requisite first and second prongs of the *Dhanasar* analytical framework, we conclude that she has not demonstrated that she is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

[7] It is unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).